946.

SUPREME COURT OF THE UNITED STATES.

No. 110.

JOHN D. BOWLING, PLAINTIFF IN ERROR,

vs.

JILSON P. HARRISON.

IN ERROR TO THE CIRCUIT COURT U. S. FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

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JOHN D. BOWLING
vs.
JILSON P. HARRISON.

Pleas before the honorable John McKinley, presiding judge of the circuit court of the United States, held at the town of Jackson, in and for the ninth circuit and southern district of Mississippi, at the May term, in the year of our Lord one thousand eight hundred and forty-two.

Be it remembered, that heretofore, to wit, on the 2d day of April, A. D. 1840, the following writ of summons ad respondendum, issued out of the clerk's office of the court aforesaid, in the words and figures, to wit:

UNITED STATES OF AMERICA,
Southern district of Mississippi, ss:

The President of the United States to the marshal of the southern district of Mississippi, greeting:

We command you, without delay, to summon Jilson P. Harrison, a citizen of the State of Mississippi, that he be and appear at the circuit court of the United States, to be held at the city of Jackson, in and for the southern district of Mississippi, on the first Monday of May next, to answer to John D. Bowling, a citizen of the State of Maryland, of a plea of trespass on the case to his damage ten thousand dollars; and that he do file his plea or defence with the clerk of said court, on or before the meeting of the same, or judgment will be given against him by default; and have then there this writ.

Witness the honorable Roger B. Taney, chief justice of the Supreme Court of the United States, the 2d day of April, A. D. 1840, [SEAL] and in the 64th year of the independence of the United States.

WM. BURNS, *Cl'k.*

Marshal's return.

Executed 4th April, 1840.

WM. M. GWIN, *Marshal.*
By E. H. GREER, *Deputy.*

And on the same day of suing out the writ aforesaid, the said plaintiff, by Lake and Yerger, his attorneys, filed his declaration herein against the said defendant, in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Southern district of Mississippi:

Circuit court 9th judicial circuit, May term, 1840.

John D. Bowling, a citizen of the State of Maryland, by his attorney, complains of Jilson P. Harrison, a citizen of the State of Mississippi,

summoned, &c., in a plea of trespass on the case on promises: for this, that heretofore Albert G. Creath, to wit, on the 26th day of November, in the year of the Lord eighteen hundred and thirty-six, at Vicksburg, to wit, in the district aforesaid, made his certain promissory note in writing, by the name of A. G. Creath, the date whereof is the day and year aforesaid, and thereby then and there promised to pay, two years after date, to the order of William M. Pinckard, by the name of W. M. Pinckard, five thousand eight hundred dollars, for value received, negotiable and payable at the office Planters' Bank, Vicksburg, meaning, office Planters' Bank, State of Mississippi, at Vicksburg, and then and there delivered the said promissory note to the said Wm. M. Pinckard, who then and there, by the name of W. M. Pinckard, endorsed and delivered the same to Pinckard and Payne, who then and there, by their partnership name of Pinckard & Payne, endorsed and delivered the same to the defendant, Jilson P. Harrison, who then and there by the name of J. P. Harrison, endorsed and delivered the same to the plaintiff; and the said plaintiff avers, that afterwards, when the said note became due and payable, according to the tenor and effect of the same, to wit, on the 29th day of November, 1838, to wit, in the district aforesaid, the said note was presented and shown for payment, at the office of the Planters' Bank, State of Mississippi, at Vicksburg, to the teller of said Bank, who then and there refused to pay the same, nor did the said Creath, or any other person at that or any other time, pay the same; of all which the said defendant, Jilson P. Harrison, had due notice.

By means whereof, the said defendant became liable to pay to the said plaintiff the sum of money in the said note specified, according to the tenor and effect of the said note, and the endorsement thereon; and being so liable, he the said defendant, to wit, on the day and year last aforesaid, at the district aforesaid, undertook and faithfully promised the said plaintiff to pay him the sum of money, when he, the said defendant, should be thereto afterwards requested.

And whereas, also, the said defendant, on the 29th day of November, 1838, in the district aforesaid, was indebted to the said plaintiff in the sum of five thousand eight hundred dollars, for money then and there lent by the plaintiff to the said defendant at his request; and five thousand eight hundred dollars, for money then and there paid by the plaintiff for the use of the defendant and at his request; and in five thousand eight hundred dollars, for money then and there received by the defendant for the use of the defendant; and being so indebted, the said defendant afterwards, to wit, on the day and year last aforesaid, and at the district aforesaid, undertook and faithfully promised the said plaintiff, in consideration of the promises respecting this, he would pay the said several last mentioned sums of money respectively to the plaintiff on request.

Nevertheless, the said defendant has disregarded the said promises, and has not [paid] the said several sums of money in the declaration mentioned, or any part thereof, although often requested; but so to do

the said defendant has hitherto failed and refused, and still does refuse, to the damage of the plaintiff in the sum of ten thousand dollars; and therefore he sues, &c.

W. A. LAKE,
J. S. YERGER, } *Attorneys for plaintiff.*

And the defendants, by attorney, comes and defends the wrong and injury, when &c., and says actio non, because he says he did not undertake and promise in manner and form as the said plaintiff against him has complained, and of this he puts himself upon the country.

ANDERSON & BRIEN, *for defendant.*

And the plaintiff doth the like.

LAKE & YERGER, *Attorneys for plaintiff.*

And afterwards, to wit, at the said May term of the court aforesaid, to wit, on the sixth day of June, in the year of our Lord one thousand eight hundred and forty-two, until which time this cause was legally continued, came the parties aforesaid, by their respective attorneys, and a jury being called, came, to wit, John F. Summers, J. Richards, Major Craft, James Wade, W. F. Anderson, R. W. James, Asa Tinnin, E. Wade, Theophilus Craft, J. P. Oldham, G. F. Henry, and M. E. Thomas, who being impannelled, tried, and sworn to speak the truth upon the issue joined, upon their oaths do say, that the said defendant did not undertake and promise in manner and form as the said plaintiff against him has declared.

Bill of exceptions tendered by the plaintiff.

Be it remembered that this case coming on to be tried on this 6th day of June, 1842, before the honorable John McKinley, judge, &c., and a jury; the plaintiff read to the jury the original note and the endorsements sued on, of which the following is a copy.

$5,800. VICKSBURG, *November* 26, 1836.

Two years after date, I promise to pay to the order of W. M. Pinckard, five thousand eight hundred dollars, for value received, negotiable and payable at the office Planters' Bank, Vicksburg.

(Signed) A. G. CREATH.

Endorsed. "Pay Pinckard and Payne, or order, W. M. Pinckard." "Pay J. P. Harrison, or order, Pinckard and Payne." "Pay John D. Bowling, or order, J. P. Harrison."

At the foot of said note, and on the face thereof, *were* the following memorandum.

"Third endorser, J. P. Harrison, lives at Vicksburg."

The plaintiff proved by Alexander H. Arthur, a witness, who was sworn, that said memorandum was in the handwriting of the defendant, J. P. Harrison, and thereupon said memorandum was read to the jury. The plaintiff then proved by said Arthur, that said note was deposited in the office of the Planters' Bank at Vicksburg, Mississippi, on the 29th

day of November, 1838, for collection, and that on that day, the 29th day of November, 1838, he demanded payment thereof to the teller of said bank, who refused to pay the same; that on the same day he deposited in the post office at Vicksburg, a written notice of the non-payment of said note, directed to said defendant, Jilson P. Harrison, informing him of the non-payment of said note. The said witness further stated that he acted as the agent of the Planters' Bank in making demand of payment, and giving notice of non-payment of said note. Said witness further stated that Jilson P. Harrison, the defendant, lived in the town of Vicksburg, in which is and was the office of the Planters' Bank, when the note sued on was payable at the date of the maturity of said note. That for several years prior to the maturity of said note, it had been the usage of the Planters' Bank of Vicksburg, to have notice served personally upon the endorsers resident in Vicksburg, unless there was a memorandum on the note appointing some place at which notice would be received; and if there was a memorandum on the note designating a place where notice was to be served, then the notice was left at such place. That this usage applied to notes discounted or deposited in bank for collection. That the language of these agreements were generally as follows. 1st. Endorser will receive notice at Vicksburg post office, &c., though sometimes they were in the language of the one attached to the note sued on; that seeing the defendant's name written at the foot of this note sued on, he supposed it to be an undertaking on his part to receive notice through the Vicksburg post office according to the usage of the bank, and accordingly gave him notice of the non-payment of the note by depositing the same in the Vicksburg post office, addressed to him at Vicksburg, and that he gave no other notice of the non-payment of the note to defendant; this being all the evidence in the cause, the court instructed the jury, that to charge an endorser if he lived in the town in which the note was made payable, the notice must be personal, unless he had agreed to receive it elsewhere, or unless by the custom and usage of the bank at which the note is made payable, notice of non-payment was left at the post office. That the memorandum attached to the note sued on was not a sufficient agreement to receive notice at the post office, and dispense with personal service on the endorser. The court further instructed the jury that the custom and usage of the bank, as proved in this case by the witness Arthur, was not sufficient to dispense with personal notice. To which opinion of the court, the plaintiff by his attorney excepted before the jury retired from the box, and presented this his bill of exceptions, and prays that the same be signed, sealed, enrolled, and made a part of the record in this cause, which is done accordingly.

J. McKINLEY. [SEAL.]

Therefore it is considered by the court that the plaintiff take nothing by his bill, but for his *false* clamor be in mercy, &c.; and that the said defendant go hence without day, and recover against the said plaintiff his costs and charges by him about his defence in this behalf expended.

UNITED STATES OF AMERICA,
Southern district of Mississippi, Circuit court, U. S.

I, William H. Brown, clerk of said circuit court, do hereby certify, that the foregoing seven pages contain a full, true, and complete transcript of the record of the judgment in the case therein named, as the same now remain of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Jackson, this 9th day of December, A. D. 1844. [SEAL.]

W. H. BROWN, *Clerk*.

Bond to prosecute writ of error.

Know all men by these presents, that we, John D. Bowling and William D. Merrick, of the State of Maryland, are held and firmly bound unto Jilson P. Harrison, in the full and just sum of three hundred dollars, to be paid to the said Jilson P. Harrison, his certain attorney, executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this twelfth day of June, in the year of our Lord one thousand eight hundred and forty-four.

Whereas lately, at a circuit court of the United States for the southern district of Mississippi, in a suit depending in said court, between John D. Bowling, plaintiff, and Jilson P. Harrison, defendant, judgment was rendered against the said John D. Bowling, and the said John D. Bowling having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Jilson P. Harrison, citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington, the second Monday of January next.

Now the condition of the above obligation is such, that if the said John D. Bowling shall prosecute his writ to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

JNO. D. BOWLING, [SEAL.]
WM. D. MERRICK, [SEAL.]
[SEAL.]

Sealed and delivered in the presence of—
D. W. MIDDLETON.

Approved by P. V. DANIEL,
Associate justice of the Supreme Court.

Writ of error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the honorable the judges of the circuit court of the United States for the southern district of Mississippi, greeting: [SEAL]

Because in the record and proceedings, as also in the rendition of

the judgment of a plea which is in the said circuit court, before you, or some of you, between John D. Bowling, plaintiff, and Jilson P. Harrison, defendant, a manifest error hath happened, to the great damage of the said John D. Bowling, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of January next, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness the honorable Roger B. Taney, chief justice of the said Supreme Court, the 2d Monday of January, in the year of our Lord one thousand eight hundred and forty-four.

WM. THOS. CARROLL,
Clerk of the Supreme Court of the United States.

Allowed by

P. V. DANIEL,
Associate justice of the Supreme Court.

June 15th, 1844.

Filed 7th March, 1845.